IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 84689
	)	
DEDRIC RASH,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION ELEVEN
THE HONORABLE EMMETT M. O'BRIEN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A St. Louis County jury found appellant guilty of attempted kidnapping, Sections 564.011 and 565.110, RSMo 1994, and robbery in the second degree, Section 569.030, RSMo 1994. The Honorable Emmett M. O'Brien sentenced appellant, as a prior and persistent offender, to consecutive terms of twenty years and thirty years, respectively. The Missouri Court of Appeals, Eastern District, affirmed appellant's conviction by memorandum opinion filed June 4, 2002. This Court took transfer of this cause on application of the appellant, and therefore has jurisdiction pursuant to Rule 83.04. Article V, Section 9, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Appellant, Dedric Rash, was indicted for attempted kidnapping and robbery in the second degree (L.F. 5). He was later alleged and found to be a prior and persistent offender (L.F. 7-9, Tr. 25). Prior to trial, the state moved in limine to preclude the defense from making an opening statement that would outline evidence it intended to adduce in cross-examination (L.F. 14-16, Tr. 25-30).

Trial counsel objected that this violated appellant's rights to a fair trial, to present a defense, due process, and effective assistance of counsel (Tr. 27). Counsel wanted to make an opening statement regarding the inconsistencies in the description of the suspect, the victim's state of mind, where her glasses were when the incident happened, the certainty of her identification, facts regarding the arrest, the lineup, and the condition of the car (Tr. 29-30). The state's motion in limine was sustained (Tr. 30).

After the state's opening statement, defense counsel stated:

> Your Honor, at this time I would like to make an opening statement. However, based on the Court's motion in limine sustaining the state's motion in limine prior to trial, I don't feel that the Court's ruling will permit me to make an opening statement. I would incorporate all of the arguments that I made earlier when we were discussing the State's motion in limine at this time.

(Tr. 130). The state's evidence consisted of the following:

Appellant was employed by Bon Appetit Food Services at Washington University in St. Louis County (Tr. 131-133). The telephone number listed on his job application was 383-3321 (Tr. 134-135). The address listed was 6356 Henner (Tr. 135). On the evening of May 3, 2000, appellant was at work, but he was fired around 6:00 or 7:00 p.m. (Tr. 137-138). According to the manager, he was wearing a cap; he often wore a red cap (Tr. 137-138).

Sarah Kaufman was a student at Washington University (Tr. 149-150). About midnight that night, she was going to the library to study (Tr. 151). She parked her Ford Explorer and began to get her books and laptop out of the back seat (Tr. 151-157). Someone attacked her from behind, pushing her and yelling "get in the car, bitch" (Tr. 157-158).

Kaufman tried to scream and struggle, and the man hit her in the mouth (Tr. 158). He put his hand over her mouth and she bit him (Tr. 158). He bit her back (Tr. 158). The man pushed Kaufman so that she was lying back on the seat (Tr. 159). She tried to sit up, but he hit her in the forehead (Tr. 159). He knocked off her glasses and knocked the keys from her hand (Tr. 160). She moved into the middle of the back seat (Tr. 161). The man got into the back seat with her and shut the door (Tr. 161).

The dome light was still on; it does not go out until the car is started (Tr. 162). The man asked Kaufman how to turn off the light and she told him the car had to be started (Tr. 163). He told her to climb over into the middle of the front seat, and she did (Tr. 163).

The man climbed into the driver's seat and told Kaufman "don't even try to run away" (Tr. 163). He turned on the engine and started pressing window buttons, trying to lock the doors (Tr. 163-164). He asked Kaufman how to lock the doors and told her if she got out he would kill her (Tr. 164). She opened the door and jumped out (Tr. 164).

The man grabbed the back of Kaufman's shirt, but she pushed herself out (Tr. 164). He put the car in reverse and the open door hit her in the back (Tr. 164). She ran to a phone and called the police as the man drove away (Tr. 165).

Kaufman described the man to the officer as mid twenties, medium build, medium to dark complexion, sweatshirt and ball cap, and a bag over his shoulder (Tr. 166, 221). She picked appellant out of a photo lineup a few days later (Tr. 170-172, 225-228). At trial, Kaufman identified appellant as her attacker (Tr. 176).

Kaufman's cell phone was still in the car when the man drove away (Tr. 167). She gave the number of the phone to the police officer (Tr. 173). On her phone bill, later, was a call to 383-3321 made at 12:49 that night (Tr. 175, 222-223).

This phone number was listed to Esther Green, who lived at 6356 Henner (Tr. 203). Her boyfriend, Elmer Cooper, lived with her, along with his cousin, appellant (Tr. 203). Green testified that appellant called her at 12:49 that night and she recognized his voice; he was looking for Cooper (Tr. 207). The police

later checked Green's caller ID – it listed the number of Kaufman's cell phone (Tr. 211).

The Ford Explorer was found on May 13, in Albuquerque, New Mexico (Tr. 272-273). Appellant was riding in the front passenger seat (Tr. 274). He was wearing a red ball cap (Tr. 277). Later, after the car was returned to Kaufman's mother, she discovered a pay stub made out to appellant and a dark blue sweatshirt in the car (Tr. 231, 292-294).

Defense counsel presented the following defense case, through the cross-examination of the state's witnesses.

Appellant generally wore a tongue ring (Tr. 148). A person could see it in his mouth when he talked (Tr. 149). Sometimes appellant would wear clothing other than sweat shirts and ball caps (Tr. 141-147).

Sarah Kaufman never saw a pierced tongue on her assailant (Tr. 183). It was dark out that night, although there were streetlights in the area (Tr. 184).

Esther Green did not remember a phone call that night at first (Tr. 214). Later her boyfriend said, maybe it was Dedric (Tr. 215). She also testified about appellant's tongue ring (Tr. 218).

The jury returned a verdict of guilty on both counts (Tr. 346, L.F. 38-39). The Honorable Emmett M. O'Brien sentenced appellant to twenty years for attempted kidnapping and thirty years for robbery in the second degree, as a prior and persistent offender, to be served consecutively (S.Tr. 1, 4, L.F. 44-46).

Appellant appealed his convictions to the Missouri Court of Appeals, Eastern District, who affirmed by memorandum order filed June 4, 2002. Appellant filed a transfer application to this Court. Transfer was granted on August 27, 2002.

POINT RELIED ON

The trial court erred in sustaining the state's motion and refusing to permit defense counsel to make an opening statement outlining for the jury the factual evidence that would be elicited from the state's witnesses, because this ruling violated appellant's rights to due process and to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that defense counsel was thereby unable to inform the jury of the nature of the defense so as to enable the jurors to appreciate the significance of the evidence as it was presented, and there were facts elicited in cross-examination that tended to show that Sarah Kaufman's identification of appellant may have been mistaken.

State v. Thompson, 68 S.W.3d 393 (Mo. banc 2002);

Hays v. Missouri Pac. R. Co., 304 S.W.2d 800 (Mo. 1957);

State v. Taylor, 929 S.W.2d 925 (Mo. App., S.D. 1996);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

Rule 27.02.

ARGUMENT

The trial court erred in sustaining the state's motion and refusing to permit defense counsel to make an opening statement outlining for the jury the factual evidence that would be elicited from the state's witnesses, because this ruling violated appellant's rights to due process and to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that defense counsel was thereby unable to inform the jury of the nature of the defense so as to enable the jurors to appreciate the significance of the evidence as it was presented, and there were facts elicited in cross-examination that tended to show that Sarah Kaufman's identification of appellant may have been mistaken.

Prior to trial, the state moved in limine to preclude the defense from making an opening statement that would outline evidence the defense intended to adduce in cross-examination (L.F. 14-16, Tr. 25-30).

Trial counsel objected that this violated appellant's rights to a fair trial, to present a defense, due process, and effective assistance of counsel (Tr. 27). Counsel wanted to talk about facts regarding the inconsistencies in the description of the suspect, the state of mind of the victim, where her glasses were when the incident happened, the certainty of her identification, facts regarding the arrest, the

condition of the car, and facts regarding how the lineup was conducted (Tr. 29-30). The state's motion in limine was sustained (Tr. 30).

After the state's opening statement, defense counsel stated:

> Your Honor, at this time I would like to make an opening statement. However, based on the Court's motion in limine sustaining the state's motion in limine prior to trial, I don't feel that the Court's ruling will permit me to make an opening statement. I would incorporate all of the arguments that I made earlier when we were discussing the State's motion in limine at this time.

(Tr. 130).

The law at the time of the trial supported the trial court's ruling. ***See, State v. Nelson,*** 831 S.W.2d 665 (Mo. App., W.D. 1992); ***State v. Bibbs***, 634 S.W.2d 499 (Mo. App., E.D. 1982). In ***State v. Thompson***, 68 S.W.3d 393 (Mo. banc 2002), this Court overruled that line of cases and held that denying defense counsel the opportunity to make an opening statement that referred to cross-examination of state witnesses was reversible error.

Rule 27.02(f) provides that in felony trials, after the attorney for the State makes an opening statement, "[t]he attorney for the defendant may make an opening statement." The primary purpose of an opening statement is to inform the judge and the jury in a general way of the nature of the action so as to enable them to understand the case and to appreciate the significance of the evidence as it is presented. ***Hays v. Missouri Pac. R. Co.,*** 304 S.W.2d 800, 804 (Mo. 1957).

This Court noted in ***Thompson*** that cross-examination may establish facts, and it is proper to make an opening statement consisting of factual statements that can be proved. 68 S.W.3d at 394. Therefore, an absolute ban on reference to all cross-examination testimony denies the defendant the right to an opening statement. ***Id***.

It was error in ***Thompson*** to prevent the defense attorney from giving an opening statement, because what was sought to be presented was factual, not argumentative. ***Id.*** That is also the case here. Defense counsel wanted to talk about facts regarding the inconsistencies in the description of the suspect, the state of mind of the victim, where her glasses were when the incident happened, the certainty of her identification, facts regarding the arrest, the condition of the car, and facts regarding how the lineup was conducted (Tr. 29-30). In her actual cross-examinations, the following facts were elicited.

Appellant generally wore a tongue ring (Tr. 148). A person could see it in his mouth when he talked (Tr. 149). Sometimes appellant would wear clothing other than sweat shirts and ball caps (Tr. 141-147).

Sarah Kaufman never saw a pierced tongue on her assailant (Tr. 183). It was dark out that night, although there were streetlights in the area (Tr. 184).

Esther Green did not remember a phone call that night at first (Tr. 214). Later her boyfriend said, maybe it was Dedric (Tr. 215). She also testified about appellant's tongue ring (Tr. 218).

As in ***Thompson***, defense counsel should have been allowed to discuss in opening statement the factual evidence she intended to elicit from the state's witnesses, and the trial court erred in refusing to permit her to do so.

Error alone does not warrant reversal. ***Thompson***, 68 S.W.3d at 395. Reversal requires prejudicial error. ***Id***. In ***Thompson***, defense counsel wanted to reference facts which she intended to elicit on cross-examination to counter the state's circumstantial case.[1] ***Id***.

Appellant's defense was one of misidentification. Defense counsel cross-examined the state's witnesses extensively on the weaknesses in the identification of appellant (see Tr. 141-149, 183-184, 214-218). Yet without an opening statement, defense counsel was unable to "inform the jury of the nature of the defense so as to enable the jurors to appreciate the significance of the evidence" as it was presented. ***Id***. As in ***Thompson***, not until closing argument did jurors learn the importance of the facts elicited on cross-examination. ***Id***.

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[1] The facts which defense counsel wanted to reference were that (1) Shortly after the murder, Thompson was acting normal, not disturbed, and had no scratches, bruises, swelling, blood or bandages; (2) The police searched Thompson's car for forensic evidence linking him to the murder but did not find any; (3) Fingerprints found by the police near the crime scene did not match Thompson's; and (4) The police were unable to match the bloody shoeprints found at the crime scene with the shoes Thompson was wearing at the time he turned himself in. ***Id.***

Respondent argued below that the record made by trial counsel was insufficient to preserve this issue for review. Defense counsel made a record at the time she would have made an opening statement. But respondent presumably asserts that defense counsel should have made the very opening statement that the judge had instructed her not to make, in contravention of his orders, to preserved the issue. But this is not the law.

In ***State v. Taylor***, 929 S.W.2d 925 (Mo. App., S.D. 1996), the trial court sustained the state's motion in limine to limit evidence of the defendant's intoxication. The defendant's counsel made an officer of proof which was refused. 929 S.W.2d at 927. The state contended on appeal that to preserve the issue, counsel should have offered the evidence. However, the ruling had come just before the relevant witness was called to testify. ***Id.***

The Court of Appeals disagreed with the state. "The trial court might have been offended had Appellant attempted to elicit testimony contrary to the ruling thereafter in front of the jury. That could have been construed as an attempt to circumvent the court's determination. Appellant did all he could reasonably have been expected to do to preserve the point and it will be considered on the merits." ***Id.***

Here, as well, appellant's trial counsel did all she could reasonably have been expected to do. When asked to make an opening statement, she approached the bench and made her record. No one at that trial was confused as to the remedy she was requesting.

The Court of Appeals had a similar concern in its opinion. It noted that after the state's opening statement, defense counsel stated: "Your Honor, at this time I would like to make an opening statement. However, based on the Court's motion in limine sustaining the state's motion in limine prior to trial, I don't feel that the Court's ruling will permit me to make an opening statement. I would incorporate all of the arguments that I made earlier when we were discussing the State's motion in limine at this time." (Tr. 130). She then reserved her opening statement.

The Court of Appeals held that because defense counsel *reserved* her opening statement, and then did not make one at the end of the state's case, the error was waived. Mem. op. at 7-8. This simply turns ***Thompson*** on its head. The whole point of ***Thompson*** is that defense counsel cannot be precluded from making an opening statement about evidence the defense will elicit during the *state's* case-in-chief. Even pre-***Thompson*** the defense could not be precluded from making an opening statement about its *own* case-in-chief. Reserving opening statement to that point was irrelevant to what defense counsel wanted to do; what ***Thompson*** holds defense counsel *can* do; make an opening statement about the evidence to be adduced in the *state's* case.

Furthermore, the memorandum opinion intimated that the error was waived by not making an opening statement following the state's opening statement. Mem. op. at 7. As previously noted, defense counsel did make a record at this point that she would have made an opening statement absent the trial court's

ruling (Tr. 130). But the Court of Appeals' holding, if allowed to stand, would require that defense counsel act in direct contravention of the trial court's orders, to preserve the issue.

The error was preserved, and this Court's opinion in ***Thompson*** is directly on point. This Court should therefore reverse appellant's convictions and remand for a new trial.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,087 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2002. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 12th day of September, 2002, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Ellen H. Flottman